"Does he really get ½?" – THE PROPERTY (RIGHTS OF SPOUSES) ACT 2004

1. The object of this paper is to examine the provisions of the new Property (Rights of Spouses) Act ("the Act") and to consider the legal and practical implications of its provisions. To put the Act in perspective, we will review the law relating to the division of matrimonial property before the promulgation of the Act and examine decisions from jurisdictions with similar provisions.

2. The question posed in the title is intended to provoke thought and discussion, given that this Act has been promulgated in at a time when the socio-economic status of Jamaican women is significantly better from when the Act was first conceived. The Act is said to reflect recommendations of the Family Law Committee, initially appointed in 1974, under the chairmanship of the former President of the Court of Appeal, Honourable Justice Ira Rowe. The Act was intended to remedy the deficiencies of the existing law and to provide a statutory scheme which would achieve an equitable division of assets between spouses on the breakdown of marriage. In reality, thirty years ago, the factual matrix of our society was that often times, as between a husband and wife, the husband had the greater financial status in that he was usually the sole breadwinner and chief property owner in the household. And so, in divorce proceedings women were often left with the bitter end of the stick. We all know that today this no longer the case; in today's society, a growing number of women now share an equal or greater financial standing in a relationship.

The Resolution of Matrimonial Property Disputes: Pre 2004

3. Essentially, the law which governed property relations between married persons were based on a separate property system whereby proprietary

rights of either party in a marriage was not affected by the fact of the marriage; ownership was determined primarily by who paid for the property.

4. Section 16[1] of the Married Women's Property Act ("the MWP Act") provided for the determination of questions relating to title of property between husbands and wives in a summary way, by an application to a judge of the Supreme Court or to the Resident Magistrate of the parish in which either party resides. Proceedings under the MWP Act were commenced by originating summons supported by affidavit evidence. Properly, the proceedings had to be brought while the marriage subsisted, that is, before a decree absolute.[2] It should be noted though, that the action could have been brought by writ after the marriage had ended.[3]

5. In the case of an application to a Resident Magistrate's Court, it had jurisdiction irrespective of the value of the property in dispute. The section was a procedural provision only and did not therefore entitle or permit a court to vary the existing proprietary rights of the parties, as it conferred no rights on either party. Consequently, resort was had to principles of common law and/or equity and in particular the law of trust in order to determine parties' rights.

6. Two fundamental rules emerged from two leading English cases **Pettit v. Pettit**[4] and **Gissing v. Gissing**[5], decided within a year of each other. These are described in *Bromley's Family Law* in this way:

---

[1] Section 16 provides that "in any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society, as aforesaid in whose books any stocks, funds or shares of either party are standing, ... and the Judge may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as and any inquiry touching the matters in question to be made in such manner as he shall think fit."

[2] Mowatt v. Mowatt (1979) 28 WIR 96.

[3] Forrester v. Forrester (1982) Suit No. C.L. 1978/F-108, Judgment, 12/11/82.

[4] [1970] A. C. 777

[5] [1971] A. C. 886

> *"It is clear from **Pettit v Pettit** that English law has no doctrine of community of property or any separate rules of law applicable to family assets. Consequently, if one spouse buys property intended for common use with the other – whether it is a house, furniture or a car – this cannot per se give the latter any proprietary interest. From this follows the second principle, stated in **Gissing v. Gissing**, that if either of them seeks to establish a beneficial interest in property, the legal title to which is vested in the other, he or she can do so only by establishing that the legal owner holds the property on trust for the Claimant."*[6]

7. These principles have been adopted in Jamaica and applied in different ways in several cases. In **Stewart v. Stewart**[7] Ellis J. observed:

> *"in determining property rights a Court is to find out what the intention of the parties respecting their proprietary interest in the property. The evidence must be directed mainly to enable the Court to so find out. The intention which the Court is to find out is that of the parties at the time of acquisition".*

8. The Court was therefore left to try and ascertain the parties' intention, in circumstances where the parties in all likelihood, had given no thought to the question at the relevant time. In the absence of direct evidence of an agreement, the Court was therefore obliged to draw inferences from the conduct of the parties at the time. While this exercise may legitimately result in a Court inferring an intention, which the parities never consciously had, what the Court cannot do is *"impute to them an agreement they clearly did not make"*[8].

9. Where the property was registered in the name of one party only, the determination of the beneficial interest was, in most cases, difficult to resolve because of the nature of the relationship of husband and wife. The

---

[6] Family Law, 7th ed., page 530
[7] Suit No. E 122 of 1982, Judgment Feb. 8, 1986
[8] *Bromley Family Law, Ibid* page 530